

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHYRIAA HENDERSON, on behalf of
herself, and all others similarly situated,

Plaintiff,

v.

UNITED STUDENT AID FUNDS, INC.,
D/B/A/ USA FUNDS,

Defendant.

Case No. 13cv1845-L (BLM)

ORDER:

**(1) DENYING AS MOOT
PLAINTIFF'S *EX PARTE* MOTION TO
CONTINUE THE DATE FOR FILING
HER CLASS CERTIFICATION
MOTION [ECF No. 29];**

**(2) GRANTING PLAINTIFF'S *EX
PARTE* MOTION TO MODIFY THE
SCHEDULING ORDER [ECF No. 30];**

**(3) MODIFYING THE CASE
MANAGEMENT ORDER;**

**(4) DENYING AS PREMATURE
PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION [ECF No. 35]; AND**

**(5) DENYING AS MOOT
PLAINTIFF'S MOTION TO FILE
DOCUMENTS UNDER SEAL
[ECF No. 33].**

On August 20, 2014, Plaintiff filed an *ex parte* motion to continue the class certification deadline. ECF No. 29. On August 21, 2014, Plaintiff filed a second *ex parte* motion asking the Court to amend the scheduling order. ECF No. 30. Plaintiff did not contact the Court prior to filing the *ex parte* motions, as required by the Court's Chamber's

1 Rules. On August 21, 2014, defense counsel advised the Court that Defendant intended
2 to oppose Plaintiff's motions. On the same day, the Court issued an expedited briefing
3 schedule for the pending motions. ECF No. 31. After Plaintiff's counsel contacted the Court
4 to inquire whether the pending motions "tolled" the existing deadlines, the Court conducted
5 a telephonic conference with the parties on August 22, 2014, and issued an order denying
6 Plaintiff's verbal request to "toll" the current deadlines pending a ruling on the *ex parte*
7 motions. ECF No. 32. On August 22, 2014, Plaintiff filed her motion for class certification.
8 ECF No. 35.

9 In accordance with the Court's August 21, 2014 order setting briefing schedule, on
10 August 25, 2014, Defendant filed an opposition to Plaintiff's *ex parte* applications to
11 continue the deadline for filing motions for class certification and for modification of the
12 scheduling order. See ECF Nos. 31, 36. On August 29, 2014, Plaintiff replied to
13 Defendant's opposition to Plaintiff's *ex parte* motions. ECF No. 38. Having considered all
14 of the briefing and supporting documents presented, and for the reasons set forth below,
15 Plaintiff's *ex parte* motion to continue the date for the motion for class certification is
16 **DENIED** as moot, and Plaintiff's *ex parte* motion to modify the scheduling order is
17 **GRANTED**.

18 FACTUAL BACKGROUND

19 On August 8, 2013, Plaintiff filed a class action complaint alleging that Defendant
20 violated the Telephone Consumer Protection Act, 47 U.S.C. §§ 227 *et seq.*, by invading
21 Plaintiff's privacy. ECF No. 1 at 1-2. Plaintiff alleges that beginning in 2009 through June
22 2013, she received unsolicited phone calls to her wireless phone attempting to collect a
23 debt. Id. at 4. Plaintiff claims that she did not provide prior express consent to be
24 contacted on her cellular telephone by Defendant or its agents, and alleges that they
25 obtained her cell phone number from a third party by "trapping" such number. Id. Plaintiff
26 further alleges that the phone calls were placed to her cellular telephone "via an 'automatic
27 telephone dialing system,' ('ATDS') as defined by the 47 U.S.C. § 227 (a)(1) and by using
28 'an artificial or prerecorded voice' system as prohibited by 47 U.S.C. § 227 (b)(1)(A), which

1 had the capacity to produce or store numbers randomly or sequentially, and to dial such
 2 numbers, to place telephone calls to Plaintiff's cellular telephone." Id. at 4-5; see also id. at
 3 8-9. Plaintiff brought the class action on behalf of herself and all others similarly situated
 4 who received phone calls from Defendant or its agents to their wireless telephones without
 5 consent. See id. at 5-8.

6 On December 20, 2013, the Court issued a Case Management Order ("CMC Order")
 7 setting February 14, 2014, as the deadline to amend the pleadings and requiring Plaintiff
 8 to file her motion for class certification by June 20, 2014. ECF No. 22 at 1. On January 27,
 9 2014, Plaintiff served Defendant with her First Set of Requests for Production of Documents
 10 and First Set of Interrogatories, and on March 28, 2014, Defendant responded to Plaintiff's
 11 discovery requests. ECF No. 29-1, Exhs. A-B; see also ECF No. 29-1, Declaration of Alexis
 12 M. Wood ("Wood Decl. I") at 2-3; ECF No. 30-1, Declaration of Alexis M. Wood ("Wood
 13 Decl. II") at 2. On June 10, 2014, the parties moved the Court to continue the class
 14 certification motion deadline and the Mandatory Settlement Conference date by sixty days.¹
 15 ECF No. 27 at 2. The Court granted the parties' motion, extended the filing deadline for
 16 Plaintiff's motion for class certification until August 22, 2014, and extended all remaining
 17 dates in its CMC Order. ECF No. 28.

18 LEGAL STANDARD

19 Once a Rule 16 scheduling order is issued, dates set forth therein may be modified
 20 only "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); see also ECF
 21 No. 22 at 7 (stating that the dates set forth in the CMC Order regulating discovery and
 22 other pretrial proceedings "will not be modified except for good cause shown"). The Rule
 23 16 good cause standard focuses on the "reasonable diligence" of the moving party. Noyes
 24 v. Kelly Servs., 488 F.3d 1163, 1174 n.6 (9th Cir. 2007); Coleman v. Quaker Oats Co., 232

25
 26 ¹ In support, the parties stated that "Defendant has advised Plaintiff that several of the categories of
 27 documents sought by Plaintiff in Plaintiff's Requests for Production of Documents would be in the custody of
 28 third parties such as the servicer of Plaintiff's loans and collection agencies retained by the servicer, which
 Defendant is unable to obtain itself, necessitating the need for Plaintiff to issue subpoenas." ECF No. 27 at 2.
 Consequently, the parties claimed that Plaintiff required additional time to seek discovery from the third parties
 to "adequately prepare" her class certification motion. Id.

1 F.3d 1271, 1294-95 (9th Cir. 2000) (stating Rule 16(b) scheduling order may be modified
 2 for "good cause" based primarily on diligence of moving party). Essentially, "the focus of
 3 the inquiry is upon the moving party's reasons for seeking modification." Johnson v.
 4 Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). However, a court also may
 5 consider the "existence or degree of prejudice to the party opposing the modification"
 6 Id.

7 In addition to being required to establish good cause, a party moving to amend a
 8 pleading after a scheduling order deadline has passed must demonstrate excusable neglect.
 9 Mireles v. Paragon Sys., Inc., 2014 WL 575713, at *2 (S.D. Cal. Feb. 11, 2014) (citing Weil
 10 v. Carecore Nat'l, LLC, 2011 WL 1938196, at *2 (D. Colo. May 19, 2011)); see also Fed. R.
 11 Civ. P. 6(b)(1)(B) (stating "the court may, for good cause, extend the time on motion made
 12 after the time has expired if the party failed to act because of excusable neglect."). The
 13 following factors are considered in determining whether there has been excusable neglect:
 14 the danger of prejudice to the non-moving party; the length of the delay and its potential
 15 impact on judicial proceedings; the reason for the delay, including whether it was within the
 16 reasonable control of the movant; and whether the moving party's conduct was in good
 17 faith. Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 395 (1993).

18 DISCUSSION

19 A. Plaintiff's Ex Parte Motion to Continue the Date for Filing her Class 20 Certification Motion

21 After filing an *ex parte* motion requesting the continuance of the class certification
 22 motion deadline on August 20, 2014, and participating in a telephonic conference with the
 23 Court and the opposing counsel on August 21, 2014, Plaintiff filed her motion for class
 24 certification. ECF No. 35. Accordingly, the Court **DENIES** Plaintiff's *ex parte* motion to
 25 continue the date for filing her class certification motion as moot.

26 B. Plaintiff's Ex Parte Motion to Modify the Scheduling Order

27 Plaintiff moves the Court to modify its December 20, 2013, Case Management
 28 Conference ("CMC") Order. ECF No. 30 at 2. Plaintiff seeks to continue the already-passed

1 February 14, 2014, deadline to amend the pleadings in order to file an amended complaint
2 adding new defendants "brought to light" after her review of the documents produced
3 during discovery, and to extend all other deadlines in the CMC Order by ninety days. Id.;
4 see also Wood Decl. I at 2, 6-7 (containing Plaintiff's counsel's statement that Plaintiff "has
5 recently learned that several third party debt collection agencies are responsible for placing
6 phone calls on behalf of Defendant," and that she needs additional time to obtain discovery
7 from such third parties). Plaintiff asserts that she has established the good cause required
8 to modify the CMC Order because she assisted the Court in crafting the Order, learned
9 about the involvement of Navient Solutions, Inc. ("Navient") and several third-party
10 collection agencies after the deadline to amend the pleadings had passed, and was diligent
11 in seeking a CMC Order modification. ECF No. 30 at 5-6. Plaintiff also argues that she has
12 established the excusable neglect requirement for the CMC Order modification because
13 Defendant will not be prejudiced by her "narrow" request for leave to file a motion to
14 amend, the requested extension will have little impact on the duration of the judicial
15 proceedings, the reason for the delay was not within her reasonable control, and she has
16 not acted in bad faith. Id. at 6-7.

17 Defendant opposes the motion by asserting that Plaintiff has known the third parties'
18 identities since March 28, 2014, when Defendant disclosed them in its interrogatory
19 responses, and that Plaintiff did not make "any discovery attempts . . . as to the
20 [c]ollection [a]gencies" and "waited until the eve of the class certification deadline to raise
21 her purported need for more discovery from Navient." ECF No. 36 at 3. Defendant argues
22 that Plaintiff was not diligent in conducting discovery, and that Plaintiff thus fails to
23 establish the good cause required to further modify the scheduling order. Id. Defendant
24 also asserts that because Plaintiff filed a class certification motion and simultaneously
25 requested a 90-day extension of all CMC Order deadlines, in order to add Navient and third-
26 party collection agencies as defendants to this lawsuit, Defendant is placed in the
27 "untenable position of having to oppose a motion for class certification while the pleadings
28 and parties remain uncertain." Id. Defendant therefore maintains that it will be prejudiced

1 if Plaintiff's motion to modify the CMC Order is granted and asks the Court to deny the
2 motion. Id. at 3, 9.

3 Plaintiff responds that Defendant caused a significant delay by waiting nearly eight
4 months to advise Plaintiff of its defense that "it d[id] not make collection calls" and that it
5 had no documents or evidence relative to Plaintiff's complaint. ECF No. 38 at 8-9; see also
6 id. at 6. Plaintiff asserts that given Defendant's "new" defense, and publically-available
7 information calling into question the accuracy of Defendant's assertion that it did not make
8 collection calls, she was required to further investigate her claims before serving subpoenas
9 on third-party entities and seeking to amend her complaint. See id. at 7; see also ECF
10 No. 29-1, Exh. D. Plaintiff also challenges Defendant's claim of prejudice resulting from
11 having to oppose her motion for class certification while the pleadings and parties remain
12 uncertain, by asserting that Defendant could have avoided the situation by agreeing to
13 stipulate to an extension of the motion for class certification deadline. ECF No. 38 at 6.

14 **1. Good Cause**

15 While the Court believes that Plaintiff should have pursued the third-party discovery
16 in a more timely manner after receiving Defendant's March 28, 2014, discovery responses,
17 the Court cannot find that Plaintiff has not been "reasonably diligent" in investigating and
18 prosecuting her case. Initially, a review of the parties' joint discovery plan lodged on
19 December 9, 2013, reveals that Plaintiff proposed May 30, 2014, as the deadline to amend
20 the pleadings and indicated that she "may move to amend her complaint by, among other
21 things . . . amending to include additional defendants." ECF No. 30-1 at 8. As such,
22 Plaintiff did request a longer period of time for the deadline to move to amend, and thus
23 was diligent in creating a workable scheduling order under Rule 16. See Hood v. Hartford
24 Life and Acc. Ins. Co., 567 F. Supp. 2d 1221, 1224 (E.D. Cal. 2008); Becerra v. Nat'l
25 Recovery Solutions, LLC, 2014 WL 3700210, at *4 (S.D. Cal. July 24, 2014).

26 Second, the Court finds that "matters which could not have been reasonably
27 foreseen or anticipated at the time of the Rule 16 scheduling conference" prevented
28 Plaintiff's compliance with the deadline. See Hood, 567 F. Supp. 2d at 1224. On January

27, 2014, five weeks after the Court's CMC Order, Plaintiff served Defendant with her first set of discovery requests. See ECF No. 22; Wood Decl. I at 2; Wood Decl. II at 2. On March 28, 2014, two months after Plaintiff served her discovery requests and six weeks after the February 14, 2014 deadline to amend the pleadings, Defendant responded to Plaintiff's interrogatories by stating that it did not place collection calls to Plaintiff, that "Sallie Mae, Inc. was the servicer of Plaintiff's loans for which Defendant was the guarantor," and that "there were several collection agencies who may have handled Plaintiff's loans, including Pioneer Credit Recovery, GC Services, General Revenue Corporation, National Enterprise Systems, and NCO Group." See ECF No. 22 at 1; ECF No. 29-1, Exh. A at 23; Wood Decl. II at 2; see also ECF No. 29-1, Exh. A (responses to Int. 4-10, 12, 15-18, 20). As a result of the parties' meet and confer efforts,² by the end of May 2014, Plaintiff had learned that Defendant purchased the claims to Plaintiff's loans on September 24, 2010 and October 22, 2010, that Navient was the servicer for Plaintiff's loans, and that Navient hired third parties to make debt collection calls. See ECF No. 29-1, Exh. E; Wood Decl. I at 3-4; Wood Decl. II at 2-3.

Although the Court agrees with Defendant that Plaintiff should have conducted the third party discovery in a more timely manner and should have filed her motion to amend the complaint sooner, the Court finds that Plaintiff was not unreasonable in her decision to delay the third-party discovery while she conducted additional investigation into Defendant's claims. Defendant's March 2014, discovery responses did not clearly state whether the

² On May 6, 2014, Plaintiff sent a letter to Defendant requesting supplemental discovery responses. ECF No. 29-1, Exh. C. On May 15, 2014, the parties held a telephonic meet and confer, during which Defendant asserted that it did not make collection calls and that it produced the documents in its possession concerning Plaintiff. See ECF No. 29-1, Exh. E at 122; Wood Decl. I at 3. On May 19, 2014, Plaintiff sent a second letter to Defendant restating her belief that Defendant "ma[de] collection calls, either internally or via third party vendors acting on [its] behalf," cited various publically-available sources of information supporting her position, and asked Defendant to advise Plaintiff if her "interpretation of the . . . evidence [was] incorrect." See ECF No. 29-1, Exh. D. On May 27, 2014, Defendant sent a letter to Plaintiff, in which it reasserted that it did not make collection calls, stated that "Sallie Mae, Inc." was known at the time as "Navient Solutions, Inc.," clarified its relationship with several third-party entities, and alleged that it purchased the claims to Plaintiff's loans on September 25, 2010 and October 22, 2010, and that Navient was the servicer of Plaintiff's loans. ECF No. 29-1, Exh. E.

1 identified third-party agencies actually made the collection calls at issue in this case and
2 whether the list of the third-party agencies was complete. See ECF No. 29-1, Exh. A at 23
3 (stating that Pioneer Credit Recovery, GC Services, General Revenue Corporation, National
4 Enterprise Systems, and NCO Group “*may* have handled Plaintiff’s loans.”) (emphasis
5 added). Further, because Plaintiff’s independent research revealed publicly-available
6 information which called into question Defendant’s assertion of not making collection calls,
7 Plaintiff reasonably wanted to ascertain “the exact identity of each collection agency” that
8 allegedly made phone calls on behalf of Naveint and Defendant, and avoid “conducting a
9 fishing expedition, sending subpoenas to all debt collectors requesting if they collected on
10 Plaintiff’s loan.” See ECF No. 38 at 7-8 (citing Klein v. NW Mut. Life Ins. Co., 806 F. Supp.
11 2d 1120, 1126 (S.D. Cal. 2011) (“Discovery [] cannot be unlimited and plaintiffs have no
12 right to engage in extensive fishing expeditions.”)). Because Plaintiff’s failure to comply
13 with the February 14, 2014 deadline was at least partially attributable to Defendant’s
14 production of the requested information after the deadline to amend the pleadings, it could
15 not have been reasonably anticipated at the time of the Rule 16 scheduling conference.
16 See Hood, 567 F. Supp. 2d at 1224 (Plaintiff’s “noncompliance with a Rule 16 deadline
17 occurred . . . notwithstanding [his or her] diligent efforts to comply, because of the
18 development of matters which could not have been reasonably foreseen or anticipated at
19 the time of the Rule 16 scheduling conference”) (quoting Jackson v. Laureate, Inc., 186
20 F.R.D. 605, 608) (E.D. Cal. 1999); Mireles, 2014 WL 575713, at *2 (discovery produced
21 after the deadline to amend the pleadings “ma[de] compliance with the . . . deadline a
22 temporal impossibility that was unforeseen at the time the scheduling order was issued”);
23 Becerra, 2014 WL 3700210, at *4 (“Plaintiff’s noncompliance with the Scheduling Order’s
24 . . . deadline resulted, despite [Plaintiff’s] diligent efforts, from the development of matters
25 which could not have been reasonably anticipated at the time of the Case Management
26 Conference.”); Valles v. Gen-X Echo B, Inc., 2013 WL 5832782, at *3 (D. Colo. Sept. 27,
27 2103) (“In some cases, a party may learn new information after the amendment of
28 pleadings deadline has passed and, in such an instance, the newly-acquired information

1 satisfies Rule 16's good cause requirement.") (citation omitted).

2 Furthermore, the Court finds that while not ideally diligent, Plaintiff was reasonably
3 diligent in seeking the amendment of the CMC Order once it became apparent that she
4 could not comply with it. Plaintiff received Defendant's discovery responses on March 28,
5 2014, and one month later began a series of meet and confer efforts, including written
6 correspondence and telephonic conferences with opposing counsel, during which she
7 sought clarification and supplementation of the produced information. See ECF No. 29-1,
8 Exhs. A-E; Wood Decl. I at 3-4; Wood Decl. II at 2-3. After Defendant advised Plaintiff that
9 several of the categories of documents sought by Plaintiff were in the custody of third
10 parties, such as the servicer of Plaintiff's loans and collection agencies retained by the
11 servicer, Plaintiff obtained an extension from this Court to the CMC Order deadlines and
12 served third-party Navient with a subpoena for documents. See ECF No. 28; ECF No. 29-1,
13 Exh. F. When Plaintiff determined that the produced documents did not clearly reveal
14 which third-party vendors placed collection calls to Plaintiff, she scheduled the deposition
15 of a Navient corporate representative in order to "understand the records produced by
16 Navient and determine the entities making the calls." ECF No. 38 at 4-5; see also ECF No.
17 38-1, Declaration of Alexis M. Wood ("Wood Decl. III") at 3.

18 Although Plaintiff could have conducted discovery in a more accelerated manner, the
19 pace with which it proceeded was not unreasonable. See Mireles, 2014 WL 575713, at *3.
20 Plaintiff reasonably decided to investigate her claims prior to serving subpoenas on third-
21 party entities that "may or may not have taken part in the collection of her account" and
22 prior to seeking leave to amend her complaint in order to add new defendants. See
23 Becerra, 2014 WL 3700210, at *5 (Plaintiff was "entitled to pursue confirmatory discovery
24 . . . before moving to amend"). Furthermore, Plaintiff attempted to obtain a stipulation
25 from Defendant as to the proposed amendment of the CMC Order. See ECF No. 38 at 6;
26 Wood Decl. I at 2; Wood Decl. III at 3. As such, Plaintiff was reasonably diligent in seeking
27 to amend the CMC Order once it became apparent that she could not comply with the
28 Order. See Becerra, 2014 WL 3700210, at *5 (finding that Plaintiff was diligent in seeking

1 amendment of the Scheduling Order after conducting confirmatory discovery and
2 attempting to obtain a stipulation from Defendant); see also Mireles, 2014 WL 575713, at
3 *3 (finding good cause to allow Plaintiffs to move to amend complaint based on their
4 “representation that they were in the process of preparing an amendment to the FAC . . .
5 and communicating with Defendant to achieve a stipulation to the proposed amendment
6 before the class certification deadline”). As a result, the Court finds that Plaintiff has
7 established good cause to modify the Court’s CMC Order to permit her to seek leave to file
8 a First Amended Complaint.

9 **2. Excusable Neglect**

10 The Court has considered the four factors identified by the U.S. Supreme Court to
11 determine whether there was excusable neglect justifying the late request to file a motion
12 to amend the complaint. See Pioneer, 507 U.S. at 395. The Court finds that Plaintiff has
13 established excusable neglect for not complying with the February 14, 2014 deadline.

14 Despite Defendant’s contrary assertions, the Court does not find that an order
15 permitting Plaintiff to file a motion to amend will cause any significant prejudice to
16 Defendant. See ECF No. 36 at 3. Plaintiff’s anticipated amendment relates to the same set
17 of facts that were at issue in the original complaint, and thus will not require voluminous
18 discovery. See ECF No. 36 at 5, 7; Wood Decl. I at 6-7; Wood Decl. II at 3-4. Moreover,
19 this order extends the deadlines to file and oppose the class certification motion, thereby
20 eliminating Defendant’s concerns associated with having to oppose a motion for class
21 certification while the pleadings and parties remain uncertain. ECF No. 36 at 3. This factor
22 therefore weighs in favor of finding excusable neglect.

23 The remaining three factors also weigh in favor of the Court’s finding. The
24 authorized delay is not lengthy and it will have little impact on the length of the judicial
25 proceedings since no trial date has been set and discovery is still open. See ECF No. 28.
26 Similarly, as discussed above, Plaintiff was not able to comply with the deadline to amend
27 the pleadings at least in part because Defendant produced the information identifying the
28 third-party collection agencies after the deadline to amend. Finally, the evidentiary record

in this case indicates that Plaintiff acted in good faith.

Accordingly, the Court finds that Plaintiff has established good cause and excusable neglect justifying her late request and **GRANTS** Plaintiff's *ex parte* motion to modify the CMC order.

CONCLUSION

For the reasons set forth above, the Court **GRANTS** Plaintiff's *ex parte* motion and modifies the CMC Order as follows:

	<u>Current Date</u>	<u>New Date</u>
Deadline to File Motion to Amend	February 14, 2014	October 10, 2014
Deadline to File New Motion for Class Certification	August 22, 2014	December 12, 2014
Exchange of Expert Reports	October 31, 2014	January 30, 2015
Rebuttal Expert Reports	November 29, 2014	February 27, 2015
Discovery Cutoff	January 23, 2015	April 10, 2015
Pretrial Motions Filing Deadline	February 23, 2015	May 11, 2015
Mandatory Settlement Conference ("MSC")	November 5, 2014 at 9:30 a.m.	February 18, 2015 at 9:30 a.m.
MSC Briefs Due Date	October 29, 2014	February 11, 2015
Compliance with FRCP 26(a)(3)	June 1, 2015	August 17, 2015
Meet and Confer	June 8, 2015	August 24, 2015
Proposed Pretrial Conference Order	June 22, 2015	September 7, 2015
Pretrial Conference Date	June 29, 2015 at 11:00 a.m.	September 14, 2015 at 11:00 a.m.

All other dates, guidelines and requirements remain as previously set. See ECF No. 22.

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1 In light of this order granting Plaintiff's motion to modify the CMC Order and
2 providing Plaintiff with additional time to file a motion to amend the complaint, the Court
3 also finds it necessary to delay resolution of the class certification issue. Accordingly, the
4 Court **DENIES** as premature Plaintiff's currently-pending motion for class certification [ECF
5 No. 35] and **DENIES** as moot Plaintiff's motion to file documents under seal [ECF No. 33].

6 **IT IS SO ORDERED.**

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8 DATED: September 17, 2014

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10 BARBARA L. MAJOR
11 United States Magistrate Judge
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